

**EMPLOYEE SERVICE DETERMINATION
VPC**

This is the decision of the Railroad Retirement Board regarding whether the services performed by VPC, for Norfolk Southern Corporation (NS) constitute employee service under the Railroad Retirement and Railroad Unemployment Insurance Acts. The record indicates VPC took an early retirement from NS in October 2003. From the end of November 2003 through February 2005, VPC returned to work for NS as an employee of W.E.L., Inc. From March 2005 to date, VPC provided services for NS through his own business, VPC Environmental Co.

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In his response dated December 9, 2005, to a Board Employee Service Questionnaire, VPC stated that when he was an employee of NS, he was the manager of Budgets and Materials for the Norfolk terminal in Norfolk, Virginia. His duties were to order all necessary material used by the Transportation and Mechanical Departments. He also handled all of the environmental plans and disposal of all environmentally sensitive materials, and prepared and monitored all budgets for those departments.

Since his retirement from NS, he has performed services exclusively for NS as an employee of W.E.L., Inc., and VPC Environmental. He handles all of the environmental plans and disposal of all environmentally sensitive materials. The plans consist of daily, weekly, monthly, and quarterly inspections of tanks, storm water outfalls, environmental clean-up materials, and pipelines. He also handles all of the inspections by governmental departments that deal with environmental plans. The difference from his work as an employee is that as a contractor he no longer handles the budgets or orders any of the material.

VPC advised that W.E.L. performs demolition, dredging, and environmental services, and has approximately 40 employees. He worked for W.E.L. from November 25, 2003, through February 25, 2005. He has worked for VPC from March 3, 2005, through the present. The number of hours worked per month has varied from three hours to 92. VPC determines the sequence and priority and how his work is performed. He stated that his work was pre-assigned on the day he was hired as a consultant for the handling of all NS environmental plans.

Information obtained from William E. Litchford, President of W.E.L., indicates that that company has been in business since 1984. Its employees range from 48 to 54 full-time employees and three part-time employees. The NS is its main client,

though it also works regularly with the cities of Roanoke, Lynchburg, Salem, and Bedford; Ross Laboratories, and Frito Lay. W.E.L. has offices in Concord, Roanoke, and Bluefield, Virginia. Mr. Litchford has provided a six-page list of equipment owned by W.E.L.

VPC stated that, as an employee of NS, he reported to J. E. Pair, Norfolk Terminal Superintendent. As an employee of W.E.L., he reported to J. G. Yates, Assistant Division Superintendent, R. A. Jones, Senior General Foreman of the Pier, and J. R. Byars, Senior General Foreman of the Car Department. He currently reports to Messrs. Yates, Jones, and Byars. VPC stated that he is given yearly training and hazardous material handling, and NS has the right to change all methods and procedures in the performance of his duties.

The contract between VPC as V.P.C. Environmental Company and NS, which was entered into in April 2005 is a standard consultant contract, pursuant to which VPC waives all fringe benefits.

Mr. David C. Price, Director-Audit, Taxation Department, NS, advises that VPC performs administrative services for NS. VPC works on NS property, is paid by the hour, and averages 60 to 80 hours of service each month. Mr. Price states further:

[VPC's] responsibilities include the preparation, review, filing and retention of a variety of mandatory environmental reports. He serves as a liaison between NS and several Federal, state and local government agencies. From time to time, VPC assists with the paperwork related to environmental spills and helps coordinate the disposal of hazardous and non-hazardous materials. VPC does not perform any manual labor.

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VPC works for the same department, at the same location, and answers to the same managers [as when he was a NS employee]. The environmental services VPC provides are similar to the services he provided as an employee of NS. However, his current responsibilities are significantly less than the responsibilities he had as an employee. As an employee, VPC was responsible not only for environmental services but also for budgeting, service contracts, safety audits and other aspects of material management. As a contractor, VPC focuses solely on the environmental services.

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VPC provides services on an "as needed" basis. NS does not dictate VPC's schedule nor is it involved in his regular work routine. VPC is paid by the hour and averages approximately 60 to 80 hours of service each month.

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* * * VPC is provided a yearly training class along with NS employees on Spill Prevention Control and Countermeasure, (SPCC) and Storm Water Pollution Plan, (SWPP). He is also provided training on hazardous material handling. NS may change the methods or procedures VPC follows to the extent necessary for safety.

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Section 1(b) of the Railroad Retirement Act and section 1(d)(1) of the Railroad Unemployment Insurance Act both define a covered employee as an individual in the service of an employer for compensation.

Section 1(d) of the Railroad Retirement Act further defines an individual as "in the service of an employer" when:

(i)(A) he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, or (B) he is rendering professional or technical services and is integrated into the staff of the employer, or (C) he is rendering, on the property used in the employer's operations, personal services the rendition of which is integrated into the employer's operations; and

(ii) he renders such service for compensation * * *.

Section 1(e) of the Railroad Unemployment Insurance Act contains a definition of service substantially identical to the above, as do sections 3231(b) and 3231(d) of the Railroad Retirement Tax Act (26 U.S.C. §§ 3231(b) and (d)). While the regulations of the RRB generally merely restate this provision, it should be noted that section 203.3(b) thereof (20 CFR 203.3(b)) provides that the foregoing criteria apply irrespective of whether "the service is performed on a part-time basis * * *."

As the above definitions would indicate, the determination of whether or not an individual performs service as an employee of a covered employer is a fact-based decision that can only be made after full consideration of all relevant facts. In considering whether the control test in paragraph (A) is met, the Board will consider criteria that are derived from the commonly recognized tests of

employee-independent contractor status developed in the common law. In addition to those factors, in considering whether paragraphs (B) and/or (C) apply to an individual, we consider whether the individual is integrated into the employer's operations. The criteria utilized in an employee service determination are applied on a case-by-case basis, giving due consideration to the presence or absence of each element in reaching an appropriate conclusion with no single element being controlling. Because the holding in this type of determination is completely dependent upon the particular facts involved, each holding is limited to that set of facts and will not be automatically applied to any other case.

It should be noted that the tests set forth under paragraphs (B) and (C), above, go beyond the test contained in paragraph (A) and could hold an individual a covered employee if he is integrated into the railroad's operations even though the control test in paragraph (A) is not met. However, under an Eighth Circuit decision consistently followed by the Board, these tests do not apply to employees of independent contractors performing services for a railroad where such contractors are engaged in an independent trade or business. See Kelm v. Chicago, St. Paul, Minneapolis and Omaha Railway Company, 206 F. 2d 831 (8th Cir. 1953).

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In Reynolds v. Northern Pacific Railway, 168 F. 2d 934 (8th Cir. 1948), the Eighth Circuit stated that for purposes of liability for taxes under the analogous provision of the Railroad Retirement Tax Act, persons performing services for a railroad may be regarded as railroad employees, even though they are not directly employed or directly paid by the railroad. Id. at 942. The Court further stated that the intent of parties to the contract to avoid coverage, the historical practice of the railroad industry, and factors deciding the employment relationship under other Federal laws should all be considered. Id. at 940-941. Under other federal laws numerous factors are involved in determining whether an individual is engaged in employee service and in the absence of judicial authority directly interpreting the employee service provisions of the Railroad Retirement Act these factors may be useful in application of those provisions. A few of these are particularly noteworthy in VPC's case. An individual may not be self-employed where the employer furnishes without charge the supplies and premises for the work. See Henry v. United States, 452 F. Supp. 253, 255 (E.D. Tenn., 1978). Payment on a hourly basis rather than at a specified amount per job also indicates that the individual is an employee. See Bonney Motor Express, Inc. v. United States, 206 F. Supp. 22, 26 (E.D. Va., 1962). An independent contractor offers his service to the general public rather than to a specific employer. See May Freight Service, Inc. v. United States, 462 F. Supp. 503,

507 (E.D. N.Y., 1978). Similarly, an independent contractor generally may substitute another individual to perform the contract work, while an employee must perform the work himself. Gilmore v. United States, 443 F. Supp. 91, 97 (D. Md., 1977).

Clearly W.E.L. is an independent enterprise. Therefore, in accord with Kelm, above, VPC could not be held to be an employee of NS, while working through W.E.L., based on paragraphs (B) or (C) of section 1(d) of the Railroad Retirement Act, above. VPC Environmental is not an independent business. Accordingly, Kelm would not apply to prohibit holding VPC to be an employee of NS based on paragraphs (B) or (C) while he was working through VPC Environmental.

However, Kelm would not prevent VPC from being considered an employee of NS, if the test of paragraph (A) is met, that is, was VPC, while nominally employed by W.E.L., subject to the continuing authority of NS to supervise and direct the manner and rendition of his services. Although VPC did report to NS employees and apparently had to follow NS safety rules, NS did not dictate his schedule or was involved in his work routine. As such we cannot say that based on the record before us, the weight of the evidence supports a finding that VPC was in reality an employee of NS under paragraph (A) while working for W.E.L.

Clearly, however, his work for NS while he was working through VPC Environmental is covered under the ambit of paragraphs (B) and (C). As noted earlier, VPC is not an independent concern, but is merely VPC's name for his own consulting services. In his consulting work he performs services on NS property, he uses their supplies, follows NS work and safety rules and interfaces with NS employees.

Accordingly, it is the decision of the Board that VPC's services for NS, through VPC Environmental, were performed as an employee of NS.

Original signed by:

Michael S. Schwartz

V. M. Speakman, Jr.

Jerome F. Kever